Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FREDERICK DEGROOTH, *et al.*,

Petitioners,

v.

GENERAL DYNAMICS CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. May the extrinsic evidence exclusionary rule enunciated in *Moore v. Metropolitan Life Insurance Company* interpreting the Employee Retirement Income Security Act be interposed by an employer to effect a denial of due process to employees?

   1a. Does the application in this case of the extrinsic evidence exclusionary rule enunciated in *Moore v. Metropolitan Life Insurance Company* violate the legislative intent of the Employee Retirement Income Security Act?

   1b. Does the application in this case of the extrinsic evidence exclusionary rule of *Moore v. Metropolitan Life Insurance Company* conflict with cases in other circuits requiring employers/plan administrators to be truthful in their statements to employees?

PARTIES

The Petitioners are: FREDERICK DEGROOTH, GEORGE GLENDENNING, DONALD STOCKFORD, On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellants

The Respondents are: GENERAL DYNAMICS CORPORATION, In Its Corporate and Fiduciary Capacity as Administrator of the Executive and Professional Plan; THE EXECUTIVE AND PROFESSIONAL PLAN,

Defendants-Appellees

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit, whose judgment is herein sought to be reviewed, is not published in the Federal Reporter. It is reprinted as Appendix A hereto. The Order of the United States Court of Appeals for the Second Circuit in response to the Petitioner's Petition for Rehearing and Suggestion for Rehearing en Banc is

reprinted as Appendix B. The Opinion of the United States District Court for the District of Connecticut (Cabranes, J. Nov. 1993) is reported in 837 F.Supp. 485.

JURISDICTION

The Judgment of the United States Court of Appeals was entered on May 18, 1994 (Appendix A). A timely petition for rehearing was denied July 14, 1994. (Appendix B). The jurisdiction of the United States Supreme Court is invoked pursuant to Title 28 United States Code §1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION

This case involves the Fifth Amendment to the Constitution of the United States, which provides, *inter alia*, "No person shall be . . . deprived of . . . property, without due process of law . . ."

STATUTES

The Statutes involved are those constituting the Employee Retirement Income Security Act of 1974, which appears as 29 U.S.C. §§1001 et seq. ("ERISA"). Within ERISA the petitioners rely in part upon:

- 29 U.S.C. §1001. Congressional findings and declaration of policy
- 29 U.S.C. §1021. Duty of disclosure and reporting
- 29 U.S.C. §1022. Plan description and summary plan description

- 29 U.S.C. §1024. Filing and furnishing of information
- 29 U.S.C. §1132. Civil enforcement
- 29 U.S.C. §1144. Other laws

Pertinent portions of the foregoing statutes are set forth in Appendix C.

STATEMENT OF THE CASE

The Petitioners are employees of the General Dynamics Corporation ("General Dynamics") and were beneficiaries of a certain welfare benefit plan established by General Dynamics, more specifically known as "The Executive and Professional Plan". At various times General Dynamics issued written announcements regarding benefits under the plan, including announcements declaring major substantive changes in the plan. The Petitioners brought an action claiming that certain of such announcements constituted a special vesting of rights in the welfare benefit plan for the special class consisting of the Petitioners and all others similarly situated.

By their Complaint the Petitioners claimed that General Dynamics had made material modifications to the welfare benefit plan upon which the Petitioners relied and for which they paid consideration. Despite conduct on the part of both Petitioners and Respondents consistent with those modifications, the Summary Plan Description ("SPD") was never amended to reflect these modifications.

The Respondent argued successfully in both the District Court and the Court of Appeals that the extrinsic evidence exclusionary rule of *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988) was dispositive. By

that rule, only the formal plan documents and SPD's govern an employer's obligation under ERISA plans; other communications do not.

Petitioners submit that application of the *Moore* Rule to the instant case denies them due process.

Statement of Facts

General Dynamics created a welfare benefit plan for certain of its employees in May, 1961. An SPD effective May 1, 1981, was issued describing the plan as then in effect. Thereafter, General Dynamics announced that, effective January 1, 1985, the plan would be closed to new members and that existing members would have "grandfathered" rights so long as they paid for this privilege. This announcement came from senior management. The SPD was not amended or reissued to reflect this change. In June, 1992, General Dynamics announced that the enhanced medical benefits of the plan were being eliminated. This announcement came from senior management, and totally disregarded the payments made to that point in time by the affected employees.

The Petitioners brought their action in May, 1993, claiming, *inter alia*, that the changes effective January 1, 1985, giving them "grandfathered" rights constituted a vesting that insulated them from the changes announced in 1992.

Prior Proceedings

The Petitioners filed their Complaint in the United States District Court for the District of Connecticut in May, 1993, citing jurisdiction under ERISA, specifically 29 USC §1132(f) and 29 USC §1132(a).

Before any discovery was undertaken or even any responsive pleadings filed, General Dynamics moved to dismiss the Petitioners' Complaint on the grounds that the SPD was controlling notwithstanding the Petitioners' allegations that material changes had occurred in the more than ten years since the SPD had last been updated and they had paid for the continuation of the former plan. Citing *Moore*, the District Court (Cabranes, J.) was constrained to enter the dismissal, but did so after observing, "What can be said, at most, is that General Dynamics' failure to amend the SPD should have put the plaintiffs on notice that, sadly, the promises allegedly made to them in the inter-office memoranda apparently were not worth the paper on which they were printed." *DeGrooth v. General Dynamics Corp.*, 837 F.Supp. 485, 488 (D. Conn. Nov. 1993)

Petitioners appealed the District Court decision in the United States Court of Appeals for the Second Circuit arguing principally that application of the extrinsic evidence exclusionary rule of *Moore* was inapplicable to this case. The Court of Appeals ruled in an unpublished Summary Order dated May 18, 1994, that *Moore* was dispositive and affirmed the Judgment of the District Court. (Appendix A). Petitioners filed a Petition for Rehearing and Suggestion for Rehearing en Banc dated May 31, 1994. That Petition was denied on July 14, 1994. (Appendix B).

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT; NAMELY, "MAY THE EXTRINSIC EVIDENCE EXCLUSIONARY RULE OF *MOORE* BE USED TO DEBAR EMPLOYEES FROM THEIR RIGHT TO A PRIVATE ACTION UNDER ERISA?"

A. Violation of Legislative Intent

ERISA mandates high standards of Employer disclosure. *Moore, as applied in this case,* eviscerated that mandate by making it possible for an employer to disavow with impunity official statements made to employees.

The Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, et seq. ("ERISA") is a part of the federal labor laws of Title 29 for the general protection of employees.

ERISA was created in 1974 in part because its predecessor, the Welfare and Pension Plans Disclosure Act (1958) was not affording to employees the protection Congress intended. See, House Report #93-533, Committee on Education and Labor, 3 U.S. Cong. & Adm. News 1974, page 4641.

> The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants.
>
> Id at 4655

The Act itself specifically states, as part of its policy:

> . . . that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; . . . .
>
> ERISA, 29 U.S.C. §1001(a)

Information and disclosure in an understandable format are fundamental to ERISA. See particularly ERISA 29 U.S.C. §§ 1021, 1022 and 1024. (Appendix C). The Act provides that disclosures must be made publicly to the Secretary of Labor as well as individually to employees and beneficiaries. Included in the ERISA-required disclosures is that of a summary plan description ("SPD") and a plan description. 29 U.S.C. §1022. The SPD . . . "shall be written in a manner calculated to be understood by the *average* plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." (emphasis added) 29 U.S.C. §1022(a)(1).

In addition to ERISA's extensive requirement that employers provide comprehensive and accurate information to employees, there is the specific declaration that ERISA supersedes all state laws. 29 U.S.C. §1144(a).

The Court in *Moore* recognized that, ". . . ERISA preempts statutory and common law claims . . ." *Moore*, at 492. It went on to express its view that Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans. *Ibid.*

It is the application of these two factors, namely, the preemptive authority of ERISA and the governing status attributed to SPDs in *Moore*, that account for the denial of due process in this case. When employer pronouncements as well as the conduct of both employer and employees reflect the current relationship of the parties more accurately than the SPD, application of the *Moore* rule serves only to deny employees the safeguards of the Act and the right to redress violations of the Act.

The *Moore* doctrine as it has been applied in the instant case states that absent allegations of conduct by the employer "tantamount to fraud", employees may not ". . . rely on evidence extrinsic to the SPD to establish their rights." (Summary Order page 3, Appendix A page 4a). See also *Moore* at 492.

In other words, *Moore* would establish as unimpeachable an SPD even when it no longer describes the plan as actually administered, unless employees can meet the burden of establishing conduct "tantamount to fraud". Thus employees are effectively barred from seeking redress. The employee is placed in the position of having to question each and every pronouncement uttered by the employer pertaining to a benefit plan. The burden for veracity and authenticity is placed on the employee—ERISA intended that burden to be placed on the employer.

B. Conflict in the circuits: Employers must speak truthfully

Emerging case law in ERISA situations is diverging from the *Moore* standard. Cases such as *Fischer v. Philadelphia Elect. Co.*, 994 F.2d 130, 135 (3rd Cir. 1993); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 668-669 (2nd Cir. May 2, 1994); *Berlin v. Michigan Bell Telephone Co.*, 858

F.2d 1154, 1163 (6th Cir. 1988) require the employer/plan administrator to speak truthfully and not mislead beneficiaries. Such requirements for truthfulness are entirely consistent with the Congressional intent of ERISA.

The disclosure provisions of ERISA, especially 29 U.S.C. §§1021, 1022 and 1024, were enacted to ensure that employees knew what rights and benefits they had under pension and welfare benefit plans. In contrast, however, *Moore*, as applied in this case, is in conflict with those cases as well as the Congressional intent. Its encouragement for employers to repudiate statements made to employees sows confusion.

This is especially the case in situations involving amendments to a benefit plan which have become quite prevalent in light of recent changes in national accounting standards. For example, there are opposite results in different circuits, namely this case and that of *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034, 1039-1040 (3rd Cir. 1994) ("*Curtiss-Wright*"). In the instant case, pronouncements of changes issued by senior corporate management are declared by *Moore* to be a nullity because they were not incorporated into an SPD issued many years before. In *Curtiss-Wright*, a purported amendment that was printed in the SPD was disallowed because it had not been adopted by a legally effective procedure. In one case the SPD is unimpeachable while in the other the SPD is voided; however, in both cases formal rules take precedence over actual practice.

This Court has granted certiorari to hear the *Curtiss-Wright* case. The Petitioners suggest that the issue in this case is generically the same as that of *Curtiss-Wright*, namely, "what mechanisms are available to employees (and by corollary, employers as well) to know what rights

and benefits they may have under benefit plans where formal procedures have not been precisely followed?"

If the formal procedures of ERISA are followed at all times, then the issue is moot. However, in those cases where the formal procedures are not precisely followed, there is confusion.

More importantly, the certitude as to benefits that Congress intended is lost if the average employee is not aware that official-looking documents issued in good faith by senior management are not worth the paper on which they are printed.

CONCLUSION

In the pervasive and sensitive arena of employer health benefits, both employees and employers alike need to know their rights, benefits and obligations. ERISA was enacted for that purpose.

Unfortunately, the extrinsic evidence rule of *Moore v. Metropolitan Life Insurance Company* as applied in this case with its insistence on an unimpeachable SPD, even when that SPD no longer described the actual health benefit plan as administered:

- results in a doctrine contrary to the Congressional intent of ERISA;
- results in a rule that invites employers to repudiate their statements to employees in direct conflict with other ERISA case law that requires employers to be truthful in their statements to employees.

The Petitioners submit that there is a national need for clarification of this question. Absent such clarification, employees such as the Petitioners will continue to face denial of due process by being foreclosed from using their statutory rights under ERISA. They respectfully request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 18th day of May, one thousand nine hundred and ninety-four.

PRESENT:

HON. FRANK X. ALTIMARI,
HON. DENNIS G. JACOBS,
HON. PIERRE N. LEVAL,
- - - - - - - *Circuit Judges*

- X

FREDERICK DeGROOTH, GEORGE GLENDENNING and DONALD STOCKFORD, On behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v. 93-9326

GENERAL DYNAMICS CORPORATION, In its Corporate and Fiduciary Capacity as Administrator of the Executive and Professional plan and EXECUTIVE & PROFESSIONAL PLAN,

Defendants-Appellees.

- X

Appeal from the United States District Court for the District of Connecticut.

This cause came to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

Plaintiffs-appellants Frederick DeGrooth, George Glendenning, and Donald Stockford (collectively, "plaintiffs") appeal from a judgment entered in the United States District Court for the District of Connecticut (Cabranes, *J.*), granting defendants-appellees' motion for dismissal.

General Dynamics Corporation ("General Dynamics") has maintained and operated the Executive and Professional Plan (the "Plan") for certain executive and professional employees including plaintiffs, who are currently employed by General Dynamics. The terms of the Plan were set forth in a Summary Plan Description ("SPD") that was last revised in 1981. The SPD unambiguously reserved to General Dynamics the right to terminate, amend, or modify the Plan. Effective January 1, 1985, General Dynamics limited participation in the Plan to those employees eligible for the Plan as of December 31, 1984. In various correspondence and internal memoranda, General Dynamics referred to those employees still eligible for Plan benefits as of January 1, 1985, as the "grandfathered" Plan members.

On June 24, 1992, General Dynamics reduced certain medical benefits provided to these grandfathered Plan members. The reduction did not apply to those employees who had demonstrated an intent to take early retirement prior to July 1, 1992, and did so within 1992, and those who actually retired early prior to July 1, 1992.

Plaintiffs filed this action on March 5, 1993, contending that their Plan benefits vested as of December 31, 1984, when General Dynamics closed the Plan to new employees, but communicated to eligible employees that they were grandfathered. Plaintiffs alleged that General Dynamics reduced Plan benefits in violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 *et seq.*, and state law. Specifically, plaintiffs alleged that General Dynamics: violated ERISA by not continuing the benefits of the Plan as they existed on January 31, 1984 (Count I); violated §510 of ERISA, 29 U.S.C. §1140, by arbitrarily allowing some Plan members, but not others, to retire by December 31, 1992 and retain enhanced benefits (Count II); breached its contract under which certain Plan members were grandfathered (Count III); and violated the Connecticut Unfair Trade Practices Act, C.G.S. §42-110b ("CUTPA") (Count IV).

The district court granted the motion to dismiss all the counts pursuant to Fed. R. Civ. P. 12(b)(6), *DeGrooth v. General Dynamics Corp.*, 837 F.Supp. 485 (D.Conn. 1993). Plaintiffs appeal only the dismissal of Counts I and II. We review *de novo* the dismissal of the complaint for failure to state a claim. *See Rent Stabilization Ass'n v. Dinkins,* 5 F.3d 591, 593 (2d Cir. 1993).

Plaintiffs first argue that the district court erroneously held that *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988), was controlling with respect to their claim that the Plan benefits vested as of December 31, 1984. *Moore* held that "absent a showing tantamount to proof of fraud, an ERISA welfare plan is not subject to amendment as a result of informal communications between an employer and plan beneficiaries." 856 F.2d

at 492. We find *Moore* dispositive, despite plaintiffs' attempts to distinguish the decision.

Similarly to the plaintiffs in *Moore*, plaintiffs here attempt to rely on extrinsic evidence—interoffice memoranda and correspondence—to define the terms of the Plan and the rights of the parties. The thrust of plaintiffs' argument is that reference to the SPD is inappropriate because it did not control the relationship between the parties in light of the subsequent communications by General Dynamics. To accept this result, however, would eviscerate *Moore*, which held that plaintiffs cannot rely on informal communications to vest their welfare benefits where an SPD contains an unambiguous reservation of rights. Plaintiffs do not allege any conduct "tantamount to fraud" that would allow them to rely on evidence extrinsic to the SPD to establish their rights. Because the SPD was the controlling document between the parties, the district court correctly dismissed Count I.

Plaintiffs also contend that General Dynamics violated §510 of ERISA, 29 U.S.C. §1140, by arbitrarily allowing some, but not all, Plan members to retire within 1992 and retain their enhanced benefits. To state a claim under §510, plaintiffs must allege that adverse employment action was taken against them in retaliation for asserting their rights under ERISA or to interfere with the attainment of those rights. *See Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1089 (8th Cir. 1992). Plaintiffs allege neither an adverse employment action nor an impermissible motive. The mere reduction of benefits, standing alone, does not constitute a §510 violation. *See, e.g., Owens v. Storehouse, Inc.*, 984 F.2d 394, 400 (11th Cir. 1993) (§510 does not forbid reduction of plan benefits or discrimination in apportionment of plan benefits unless driven by a desire to retaliate or to deprive an

employee of a right under ERISA). Because plaintiffs failed to allege an adverse employment action with an impermissible motive, the district court correctly held that plaintiffs failed to state a claim under §510.

We have considered all of plaintiffs' remaining contentions and find them to be without merit. Accordingly, the judgment of the district court is AFFIRMED.

/s/
HON. FRANK X. ALTIMARI,

/s/
HON. DENNIS G. JACOBS,

/s/
HON. PIERRE N. LEVAL,

Circuit Judges.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of July one thousand nine hundred and ninety-four.

DEGROOTH

V DOCKET NUMBER: 93-9326

GENERAL DYNAMICS

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for plaintiff-appellant, Frederick DeGrooth, George Glendenning, Donald Stockford.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

SO ORDERED:
FOR THE COURT,
GEORGE LANGE III, Clerk
By: /s/ Kathy Brouwer, Operations Mgr,

7-14-94
(Date)

APPENDIX C

RELEVANT STATUTORY PROVISIONS

29 USC §1001(a)

§1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they

are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness. . . .

29 USC §1021

§1021. Duty of disclosure and reporting

(a) Summary plan description and information to be furnished to participants and beneficiaries. The administrator of each employee benefit plan shall cause to be furnished in accordance with section 104(b) [29 USC §1024(b)] to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in section 102(a)(1) [29 USC §1022(a)(1)]; and

(2) the information described in sections 104(b)(3) and 105(a) and (c) [29 USC §§1024(b)(3), 1025(a) and (c)].

(b) Plan description, modifications and changes, and reports to be filed with Secretary of Labor. The administrator shall, in accordance with section 104(a) [29 USC §1024(a)], file with the Secretary—

(1) the summary plan description described in section 102(a)(1) [29 USC §1022(a)(1)];

(2) a plan description containing the matter required in section 102(b) [29 USC §1022(b)];

(3) modifications and changes referred to in section 102(a)(2) [29 USC §1022(a)(2)];

(4) the annual report containing the information required by section 102 [29 USC §1023]; and

(5) terminal and supplementary reports as required by subsection (c) of this section. . . .

29 USC §1022

§1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b) [29 USC §1024(b)], The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan partici-

pant and shall be furnished in accordance with section 104(b)(1) [29 USC §1024(b)(1)].

(2) A plan description (containing the information required by subsection (b)) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 104(a)(1) [29 USC §1024(a)(1)]. Any material modification in terms of the plan and any change in the information described in subsection (b) shall be filed in accordance with section 104(a)(1)(D) [29 USC §1024(a)(1)(D)].

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act [29 USC §1133]).

29 USC §1024

§1024. Filing and furnishing of information

(a) Filing of annual report, plan description, summary plan description, and modifications and changes with Secretary. (1) The administrator of any employee benefit plan subject to this part shall file with the Secretary–

(A) the annual report for a plan year with 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing);

(B) the plan description within 120 days after such plan becomes subject to this part and an updated plan description, no more frequently that once every 5 years, as the Secretary may require;

(C) a copy of the summary plan description at the time such summary plan description is required to be furnished to participants and beneficiaries pursuant to subsection (b)(1)(B) of this section; and

(D) modifications and changes referred to in sections 102(a)(2) [29 USC §1022(a)(2)] within 60 days after such modification or change is adopted or occurs, as the case may be.

The Secretary shall make copies of such plan descriptions, summary plan descriptions, and annual reports available for inspection in the public document room of the Department of Labor. The administrator shall also furnish to the Secretary, upon request, any documents relating to the employee benefit plan, including

but not limited to the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated.

(2)(A) With respect to annual reports required to be filed with the Secretary under this part, he may by regulation prescribe simplified annual reports for any pension plan which covers less than 100 participants.

(B) Nothing contained in this paragraph shall preclude the Secretary from requiring any information or data from any such plan to which this part applies where he finds such data or information is necessary to carry out the purposes of this title nor shall the Secretary be precluded from revoking provisions for simplified reports for any such plan if he finds it necessary to do so in order to carry out the objectives of this title.

(3) The Secretary may by regulation exempt any welfare benefit plan from all or part of the reporting and disclosure requirements of this title, or may provide for simplified reporting and disclosure if he finds that such requirements are inappropriate as applied to welfare benefit plans.

(4) The Secretary may reject any filing under this section—

(A) if he determines that such filing is incomplete for purposes of this part; or

(B) if he determines that there is any material qualification by an accountant or actuary contained in an opinion submitted pursuant to section 103(a)(3)(A) or section 103(a)(4)(B) [29 USC §1023(a)(3)(A) or (4)(B)].

(5) If the Secretary rejects a filing of a report under paragraph (4) and if a revised filing satisfactory to the

Secretary is not submitted within 45 days after the Secretary makes his determination under paragraph (4) to reject the filing, and if the Secretary deems it in the best interest of the participants, he may take any one or more of the following actions–

(A) retain an independent qualified public accountant (as defined in section 103(a)(3)(D) [29 USC §1023(a)(3)(D)] on behalf of the participants to perform an audit.

(B) retain an enrolled actuary (as defined in section 103(a)(4)(C) of this Act [29 USC §1023(a)(4)(C)]) on behalf of the plan participants, to prepare an actuarial statement.

(C) bring a civil action for such legal or equitable relief as may be appropriate to enforce the provisions of this part, or

(D) take any other action authorized by this title.

The Administrator shall permit such accountant or actuary to inspect whatever books and records of the plan are necessary for such audit. The plan shall be liable to the Secretary for the expenses for such audit or report, and the Secretary may bring an action against the plan in any court of competent jurisdiction to recover such expenses.

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan. Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description,

and all modifications and changes referred to in section 102(a)(1) [29 USC §1022(a)(1)] –

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 102 [29 USC §1022] which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 102 [29 USC §1022] every tenth year after the plan becomes subject to his part. If there is a modification or change described in section 102(a)(1) [29 USC §1022(a)(1)], a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any

plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 120 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 103(b)(3) [29 USC §1023(b)(3)(A), (B)] and such other material (including the percentage determined under section 103(d)(11) [29 USC §1023(d)(11)]) as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

(c) **Statement of rights.** The Secretary may by regulation require that the administrator of any employee benefit plan furnish to each participant and to each beneficiary receiving benefits under the plan a statement of the rights of participants and beneficiaries under this title.

(d) Cross references. For regulations respecting coordination of reports to the Secretaries of Labor and the Treasury, see section 30004 [29 USC §1204].

29 USC §1132

§1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USC §1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USC §1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress

such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l).

(b) . . .

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form. (1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 606 [29 USC §1166(1) or (4)] with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 101(b)(4) [29 USC §1021(b)(4)]. For purposes of this paragraph, an annual report that has been rejected under section 104(a)(4) [29 USC §1024 (a)(4)] for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 101(d) [29 USC §1021(d)] with respect to any participant or beneficiary may in the court's discretion be liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity. (1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) Jurisdiction. (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties. The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) . . .

29 USC §1144

§1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USC §1003(a)] and not exempt under section 4(b) [29 USC §1003(b)]. This section shall take effect on January 1, 1975.

. . . .

Supreme Court, U.S.
FILED
OCT 18 1994
OFFICE OF THE CLERK

(2)

No. 94-660

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FREDERICK DEGROOTH, *et al.*,

Petitioners,

v.

GENERAL DYNAMICS CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX D

[Filed Nov. 19 1993]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CASE NO. 3:93CV00940 (JAC)

FREDERICK DEGROOTH, GEORGE GLENDENNING, DONALD STOCKFORD, on Behalf of Themselves and All Others Similarly Situated

v.

GENERAL DYNAMICS CORPORATION, In Its Corporate and Fiduciary Capacity As Administrator of the Executive and Professional Plan; THE EXECUTIVE AND PROFESSIONAL PLAN

JUDGMENT

This cause having come on for consideration on defendants' motion to dismiss before the Honorable Jose A. Cabranes, Chief United States District Judge, and the issues having been duly considered including applicable principles of law and on November 16, 1993, a Ruling on Defendants' Motion to Dismiss having been filed granting the motion,

It is ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendants.

Dated at New Haven, Connecticut, this 18th day of November, 1993.

KEVIN F. ROWE
CLERK, UNITED STATES DISTRICT COURT
BY [Illegible]
DEPUTY IN CHARGE

APPENDIX E

[Filed Nov 16 1993]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 3:93-940 (JAC)

FREDERICK DEGROOTH, GEORGE GLENDENNING, DONALD STOCKFORD, on Behalf of Themselves and All Others Similarly Situated

v.

GENERAL DYNAMICS CORPORATION, In Its Corporate and Fiduciary Capacity As Administrator of the Executive and Professional Plan; THE EXECUTIVE AND PROFESSIONAL PLAN

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RULING ON DEFENDANTS' MOTION TO DISMISS

JOSÉ A. CABRANES, Chief Judge:

This action arises out of a reduction in benefits provided to certain employees of defendant General Dynamics Corporation under the Executive and Professional Plan, an "employee welfare benefit plan" governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001, *et seq.* Pending before the court is the defendants' Motion to Dismiss (filed June 16, 1993). The motion was submitted for decision after oral argument on November 15, 1993.

BACKGROUND

The following facts are not in dispute. Since 1960, General Dynamics Corporation has offered and maintained the Executive and Professional Plan (the "Plan") for certain executive and professional employees, including the plaintiffs, who are current employees of General Dynamics at its Electric Boat Division in Groton, Connecticut. The plan provides life and medical insurance benefits superior to those benefits available to other employees.

On January 1, 1985, General Dynamics limited participation in the Plan to those employees who were eligible for membership as of December 31, 1984. On June 24, 1992, General Dynamics reduced certain medical benefits provided to those employees still covered by the Plan. This reduction affected medical benefits provided between the date an employee takes early retirement and the date that the employee reaches the age of 65 years. The reduction in medical benefits did not apply to those employees who had demonstrated an intent to take early retirement prior to July 1, 1992 and did so prior to the end of 1992,

and those who actually took early retirement prior to July 1, 1992. On March 3, 1993, General Dynamics made other modifications to the Plan.

On May 5, 1993, the plaintiffs filed this action alleging that General Dynamics had granted them "grandfathered" rights to benefits under the Plan as of December 31, 1984, and that General Dynamics violated these rights under ERISA and state law by modifying the benefits provided to the plaintiffs.

DISCUSSION

I.

In deciding a motion to dismiss, the court must accept as true all factual allegations in the complaint and draw inferences from these allegations in the light most favorable to the plaintiffs. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The complaint, or portions thereof, will not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

In support of their motion to dismiss, the defendants have attached a copy of the Summary Plan Description ("SPD") and the affidavit of Marie Anna Pardo, the employee benefits supervisor at General Dynamics, to their motion papers. The defendants urge the court to consider these materials in deciding their motion to dismiss. The plaintiffs respond that consideration of these outside materials would convert the defendants' motion into a motion for summary judgment. The court disagrees.

A district court has discretion to consider a document outside of the pleadings on a motion to dismiss if "[1] there was undisputed notice to the plaintiffs of [the document's] contents and [2] [the document] was integral to plaintiffs' claim." *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991), *cert. denied*, ___ U.S. ___ , 112 S.Ct. 1561 (1992); *Teagardener v. Republic-Franklin Inc. Pension Plan*, 909 F.2d 947, 949-50 (6th Cir. 1987) (district court properly considered pension plan document on a motion to dismiss, even though the plaintiffs failed to attach such document to the complaint), *cert. denied*, 498 U.S. 1027 (1991).

First, the plaintiffs in the instant case clearly had notice of the contents of the SPD. At oral argument, the plaintiffs conceded that they possessed the SPD which the defendants attached to their motion. In addition, the plaintiffs demonstrated full knowledge of the contents of the SPD, asserting that its contents had not been amended since December 1981.

Second, the SPD is "integral" to the plaintiffs' complaint. The SPD is the primary vehicle for informing plan participants and beneficiaries of their rights under an ERISA plan.[1] *See Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988). When participants file a lawsuit to determine the scope of those rights, the SPD is surely integral to that determination, even if it is not attached as an exhibit to the complaint.

---

[1]Section 102(a) of ERISA requires that the plan administrator furnish plan participants and beneficiaries with a summary plan description "written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. §1022(a).

Because the plaintiffs were on notice of the contents of the SPD and the SPD is integral to the plaintiffs' claims, the court may consider it without converting the defendants' motion to dismiss into a motion for summary judgment. However, the court may not consider the affidavit of Marie Anna Pardo, except to the limited extent it authenticates the SPD. *See Swanson v. Local 13 Pension Plan*, 779 F. Supp. 690, 695 (W.D.N.Y.) (district court converted a motion to dismiss into a motion for summary judgment because the parties submitted affidavits regarding communications between a plan administrator and the plaintiff), *aff'd without opinion*, 953 F.2d 636 (2d Cir. 1991).

II.

In Count I of the complaint, the plaintiffs allege that General Dynamics violated ERISA, 29 U.S.C. §1001 *et seq.*, by not continuing the benefits of the Plan as they existed as of December 31, 1984. The defendants argue that the plaintiffs have failed to allege any express contract provision by which their rights in the Plan vested. According to the defendants, the inter-office memoranda on which the plaintiffs rely to establish their "grandfathered" status are insufficient because such informal communications between an employer and plan beneficiaries do not—and cannot—constitute amendments to an ERISA plan. Furthermore, the defendants argue that the SPD expressly provides that General Dynamics may amend the Plan.

The plaintiffs agree that informal communications do not modify an ERISA plan, as long as plan documents are kept up-to-date as required by §102 of ERISA, 29 U.S.C. §1022. In the instant case, because the defendants have not amended the SPD or issued a new one since

December 1981, the plaintiffs argue that the court may look at the inter-office memoranda to define the terms of the Plan. Furthermore, the plaintiffs maintain that General Dynamics should be estopped from denying the effects of the inter-office memoranda since they failed to properly amend the SPD. The court finds the plaintiffs' arguments unpersuasive.

In *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988), our Court of Appeals held that "absent a showing tantamount to proof of fraud, an ERISA welfare plan is not subject to amendment as a result of informal communication between an employer and plan beneficiaries." The *Moore* court reasoned that:

> Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans. This intention was based on a sound rationale. Were all communications between an employer and plan beneficiaries to be considered along with the SPDs as establishing the terms of a welfare plan, the plan documents and the SPDs would establish merely a floor for an employer's future obligations. Predictability as to the extent of future obligations would be lost, and, consequently, substantial disincentives for even offering such plans would be created.

Moore, 856 F.2d at 492.

Unfortunately for the plaintiffs in the instant case, *Moore* bars their reliance on inter-office memoranda to define the terms of the Plan. As Plaintiffs' counsel conceded at oral argument, no allegation of fraud has been made here, nor does the record contain any evidence of bad faith or intent to deceive on the part of General Dynamics. Accordingly, under *Moore*, the plan documents and the SPD exclusively govern the terms of the Plan.

Constrained to the four corners of the SPD, the plaintiffs have not established—and cannot establish—that they are entitled to "grandfathered" benefits under the Plan. The SPD contains no provision by which the plaintiffs' rights in the Plan vested as of December 31, 1984. Furthermore, the SPD does contain a provision which expressly reserves to General Dynamics the right to amend or terminate the benefits under the Plan. *See* Summary Plan Description, attached as Exhibit A to the Affidavit of Marie Anne Pardo (filed June 16, 1993), at 45. Accordingly, the continuation of the plaintiffs' after December 31, 1984 was wholly at the discretion of General Dynamics, and the reduction of those benefits does not violate the plaintiffs' rights under ERISA.

This conclusion is not altered by the fact that General Dynamics has not amended the SPD since December 1981. Even assuming General Dynamics violated an obligation to update the SPD, the plaintiffs have not offered any authority for their assertion that an SPD does not govern the rights of the parties if it is not in perfect procedural compliance with ERISA regulations. Indeed, the opposite appears to be true; in *Moore*, the Court of Appeals enforced the terms of an SPD that was not formally amended for seven years, despite "numerous changes in its medical plans." *Moore*, 856 F.2d at 490.

Furthermore, if accepted, the plaintiffs' argument could lead to the precise result cautioned against in *Moore*—that is, disputes over the meaning and effect of informal communications between employers and plan beneficiaries every time a plan administrator failed to comply with one of the technical reporting requirements of ERISA. Accordingly, the court finds that General Dynamics' failure to amend the SPD does not undermine the validity or binding effect of the document. What can

be said, at most, is that General Dynamics' failure to amend the SPD should have put the plaintiffs on notice that, sadly, the promises allegedly made to them in the inter-office memoranda apparently were not worth the paper on which they were printed.

For the foregoing reasons, Count I of the complaint must be dismissed.

III.

In Count II of the complaint, the plaintiffs allege that General Dynamics violated §510 of ERISA, by arbitrarily allowing some Plan members, but not others, to retire by December 31, 1992 and thereby retain enhanced benefits.[2] The defendants argue that Count II should be dismissed because, even if apportioning benefits among employees is indeed arbitrary, such a practice does not constitute adverse employment action, as required by §510. The court agrees.

Section 510 "targets discriminatory conduct designed to interfere with the exercise or attainment of vested or other rights under [a] plan or ERISA." *Owens v. Storehourse, Inc.*, 984 F.2d 394, 399 (11th Cir. 1993) (citations omitted). To state a claim under §510, a plaintiff must allege that adverse employment action was taken against him in retaliation for asserting his rights under ERISA or for the purpose of interfering with the attainment of those rights. *See Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1089 (8th Cir. 1992) (to prove a

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[2]**Section 510 provides in pertinent part: "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled. . . ." 29 U.S.C. §1140.**

§510 violation, plaintiff must show that adverse employment action was taken against him); *Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990) ("[a] fundamental prerequisite to a §510 action is an allegation that the employer-employee relationship, and not merely the pension plan, was changed in some discriminatory or wrongful way"); *Swanson v. Local 13 Pension Plan*, 779 F. Supp. at 702-03 (Section 510 "only reaches conduct which fundamentally changes the employer-employee relationship").

A reduction of benefits, in and of itself, is not adverse employment action for purposes of §510. *See Berger v. Edgewater Steel Co.*, 911 F.2d 911, 922-23 (3d Cir. 1990) (informing employees of proposed retirement plan amendments did not constitute a violation of §510), *cert. denied*, 499 U.S. 920 (1991); *Owens v. Storehouse, Inc.*, 984 F.2d at 399 (reduction of medical benefits did not violate §510). Furthermore, allocating benefits among employees, or allowing some employees to retire during a grace period and thereby retain discontinued benefits, does not constitute adverse employment action. *See Owens*, 984 F.2d at 400 (Section 510 does not forbid discrimination in the apportionment of benefits within a plan); *Tusting v. Bay View Federal Savings & Loan Ass'n*, 789 F. Supp. 1034, 1043 (N.D. Cal. 1992) (Section 510 not violated where an employee allows some employees to retire during a grace period and thereby continue to receive discontinued benefits). While such practices may indeed by arbitrary, they are not actionable under §510, in the absence of further allegations of an employer's specific intent to discriminate against individual employees. *See Owens*, 984 F.2d at 400.

In the instant case, the plaintiffs merely allege that General Dynamics violated §510 by arbitrarily denying benefits to some employees while affording those benefits to others. Because it is settled that apportioning benefits, even if accomplished arbitrarily, is not adverse employment action for purposes of §510, this allegation is insufficient to state a claim under §510. Accordingly, Count II must be dismissed.

IV.

In Count III of the complaint, the plaintiffs allege that General Dynamics created a contract with them by representing that they were "grandfathered," and subsequently breached that contract by modifying the benefits provided under it. In Count IV of the complaint, the plaintiffs allege that General Dynamics violated the Connecticut Unfair Trade Practices Act, C.G.S. §41-110b ("CUTPA"), by arbitrarily allowing some Plan members but not others to retire by December 31, 1992 and thereby retain enhanced benefits. The defendants contend that these claims should be dismissed because §514(a) of ERISA preempts any and all state law claims that "related to" any employee benefit plan. The court agrees.

Section §514(a) of ERISA provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan. . . ." 29 U.S.C. §1144(a) (emphasis added). A district court must construe the phrase "relate to" in its "normal sense"—that is, a state law claim is preempted by ERISA "if it has a connection with or relevance to such a plan." *Shaw v. Delta Air Lines*, 463 U.S. 85, 97 (1983); *District of Columbia v. Gr. Wash. Bd. of Trade*, ___ U.S. ___, 113 S.Ct. 580, 583 (1992); *Smith v. Dunham-Bush, Inc.*,

959 F.2d 6, 10 (2d Cir. 1992) (ERISA preempts a breach of contract claim where that claim deals "expressly and exclusively" with benefits under the plan); *Altieri v. Cigna Dental Health, Inc.*, 753 F. Supp. 61, 64 (D. Conn. 1990) (ERISA preempts a CUTPA claim where that claim arises out of action taken in connection with the plan); *Cote v. Durham Life Insurance Co.*, 754 F. Supp. 18, 22 (D. Conn. 1991) (same).

In the instant case, both Count III (breach of contract) and Count IV(CUTPA) clearly "relate to" the Plan. These counts arise out of the same course of conduct on which the plaintiffs base their ERISA claims. Indeed, the allegations in Count III and Count IV make explicit reference to the Plan and are worded almost identically to their ERISA counterparts contained in Counts I and II, respectively. Furthermore, the relief which the plaintiffs seek in Counts III and IV depends upon an interpretation of the Plan. Under these circumstances, it is clear that the plaintiffs' state law claims "relate to" the Plan. Accordingly, Counts III and IV must be dismissed.

CONCLUSION

Based on the full record and for the reasons stated above, the defendants' Motion to Dismiss (filed June 16, 1993) (Doc #13) is GRANTED. Judgment shall enter for the defendants.

It is so ordered.

Dated at New Haven, Connecticut, this 16th day of November, 1993.

/s/ José A. Cabranes
José A. Cabranes
Chief Judge

Supreme Court, U.S.
FILED
NOV 16 1994
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No. 94-660

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OCTOBER TERM, 1994

FREDERICK DEGROOTH, *et al.*,
Petitioners,

v.

GENERAL DYNAMICS CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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November 16, 1994

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FREDERICK DEGROOTH, *et al.*,
Petitioners,

v.

GENERAL DYNAMICS CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

INTRODUCTION

Respondents, General Dynamics Corporation ("General Dynamics") and the Executive and Professional Plan (the "Plan"), oppose the issuance of a Writ of Certiorari to review the decision of the Court of Appeals for the Second Circuit. Respondents submit this Brief in Opposition pursuant to Supreme Court Rule 15.1.

STATEMENT OF THE CASE

In 1992 and 1993, General Dynamics reduced early retirement benefits under the Plan, which is an "employee welfare benefit plan" pursuant to the Employee Retire-

ment Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(1). General Dynamics' Summary Plan Description ("SPD") for the Plan, which defines the rights of the parties as required by ERISA, 29 U.S.C. § 1022(a)(1), expressly and unambiguously reserved General Dynamics' right to amend, modify or terminate the Plan.

On May 5, 1993, petitioners filed a Complaint against respondents in the United States District Court for the District of Connecticut, seeking to invalidate under ERISA, the 1992 and 1993 reductions on the principal ground that their Plan benefits had been irrevocably vested through informal communications. Petitioners claimed that their benefits in the Plan vested because, after General Dynamics closed the Plan to new entrants effective January 1, 1985, it referred to those employees still eligible for Plan benefits as the "grandfathered" Plan members in various correspondence and interoffice memoranda, and also because, as is typical in welfare benefit plans, petitioners made contributions to the health and life insurance premiums.

The District Court, Chief Judge José A. Cabranes, dismissed petitioners' Complaint with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *DeGrooth v. General Dynamics Corporation*, 837 F. Supp. 485 (D. Conn. 1993). The District Court specifically held that the informal communications informing petitioners of their "grandfathered" status could not irrevocably vest petitioners' benefits in light of the express provision contained in the SPD permitting General Dynamics to modify or terminate the Plan. *DeGrooth*, 837 F. Supp. at 488. The District Court relied on *Moore v. Metropolitan Life Insurance Company*, 856 F.2d 488 (2d Cir. 1988), which rejected an identical vesting claim:

> Plaintiffs . . . argue that the 'contract' between themselves and the Company 'consists of totality of the representations made to the employees by the

> Company, and the actions of the employees in accepting those representations by remaining with the Company. We disagree.
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> Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans. This intention was based on a sound rationale. Were all communications between an employer and plan beneficiaries to be considered along with the SPDs, as establishing the terms of a welfare plan, the plan documents and the SPD would establish merely a floor for an employer's future obligations. Predictability as to the extent of future obligations would be lost, and, consequently, substantial disincentives for even offering such plans would be created . . . .
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> We, therefore, conclude that absent a showing tantamount to proof of fraud, an ERISA welfare plan is not subject to amendment as a result of informal communication between an employer and plan beneficiaries.

Moore, 856 F.2d at 491-92; *DeGrooth*, 837 F. Supp. at 487-88 (quoting *Moore*, 856 F.2d at 492).

The District Court also rejected petitioners' argument that the reservation of rights provision in the SPD did not apply because the SPD had not been updated in other respects and was arguably not in perfect procedural compliance with ERISA regulations. *DeGrooth*, 837 F. Supp. at 488. The District Court reasoned that "[petitioners'] argument could lead to the precise result cautioned against in *Moore*—that is, disputes over the meaning and effect of informal communications between employers and plan beneficiaries—every time a plan administrator failed to comply with one of the technical reporting requirements of ERISA." *Id.* The District Court noted that *Moore* enforced "the terms of an SPD that was not formally amended for seven years, despite 'numerous changes in

its medical plans.'" *Id.* (quoting *Moore*, 856 F.2d at 490).

The Court of Appeals for the Second Circuit, Circuit Judges Frank X. Altimari, Dennis G. Jacobs and Pierre N. Leval, unanimously affirmed the decision of the District Court. (Ptn. Appendix A ("App. A.").) In an unpublished decision, the Court of Appeals reviewed *de novo* the decision of the District Court and found *Moore* "dispositive" of petitioners' Complaint. (App. A at 3a-4a.) Recognizing the absence of conduct tantamount to fraud, the Court held that the informal communications regarding the grandfathering of petitioners' Plan benefits could not vest those benefits in light of General Dynamics' unambiguous reservation of its right to amend or terminate the Plan. (App. A at 4a.)

On May 31, 1994, petitioners filed a Petition for Rehearing and Suggestion for Rehearing en Banc, which was denied on July 14, 1994. (App. B.) On October 12, 1994, petitioners filed a Petition for a Writ of Certiorari, which was received by respondents on October 17, 1994.

REASONS FOR DENYING THE PETITION

The ruling in this case is not remarkable, nor does it present any important or unresolved question of law. As explained in Section I, this case and *Moore* are based on sound reasoning and are consistent with the policies of ERISA. As explained in Section II, this case and *Moore* are also consistent with the decisions of other Circuits. In their petition, petitioners misconstrue the issue and holding in this case and in *Moore* as well as the decisions of the various Circuit Courts of Appeal in an attempt to create a conflict among the Circuits. (Ptn. 8-10). An examination of these cases, however, demonstrates that the ruling here and in *Moore* is consistent with the decisions of the other Circuits and that no conflict among the Circuits exists. Moreover, contrary to petitioners' assertion (Ptn. 10), this Court's grant of certiorari in *Schoonejongen v. Curtiss-Wright Corporation*, 18 F.3d 1034 (3d Cir.), *cert. granted*, 115 S. Ct. 42 (1994), does not impli-

cate this case. *Curtiss-Wright* involves a specific statutory provision of ERISA not involved here.

I. THIS CASE AND *MOORE* DIRECTLY IMPLEMENT THE POLICIES UNDERLYING ERISA.

Pension plans are required by ERISA to vest according to a fixed schedule. 29 U.S.C. §§ 1051(1), 1081(1). Welfare plans, however, do not vest automatically. As explained by Committees of both the House and Senate:

> To require the vesting of these ancillary benefits [medical and life insurance] would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income.

H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4670, 4726; S. Rep. No. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4639, 4890, 4935.

Moore directly implements ERISA's policy that welfare plans do not vest automatically. In *Moore,* the Court considered plaintiffs' argument that their welfare benefits vested because the plan sponsor described their benefits as "lifetime" and "at no cost" in various informal communications. 856 F.2d at 491-93. The Court held that plaintiffs' welfare benefits did not vest because the SPD reserved the plan sponsor's right to amend or terminate. 856 F.2d at 491-93. Noting that Plan SPDs, required by 29 U.S.C. § 1022, "exclusively govern an employer's obligations under ERISA," the Court adopted the rule that "absent a showing tantamount to proof of fraud, an ERISA welfare plan is not subject to amendment as a result of informal communications between an employer and plan beneficiaries." *Id.* at 492.

In *Moore* and in this case, the SPDs expressly and unambiguously reserved the plan sponsor's right to reduce or even to terminate welfare benefits. *Moore,* 856 F.2d at

490; *DeGrooth*, 837 F. Supp. at 488. In both cases, the plan participants attempted to rely on similar informal communications to vest welfare benefits. *Moore*, 856 F.2d at 490-91; *DeGrooth*, 837 F. Supp. at 488. In *Moore*, the plan participants were told they had "lifetime" benefits "at no cost." *Moore*, 856 F.2d at 490. Here, the plan participants were told they were "grandfathered." *DeGrooth*, 837 F. Supp. at 488. In both cases, the plan participants relied on informal communications to claim that their welfare benefits vested, despite the respective SPDs' reservations of rights. *Moore*, 856 F.2d at 490; *DeGrooth*, 837 F. Supp. at 488. In both cases, the plan participants were unable to plead or prove conduct tantamount to fraud, and thus were barred from relying upon the informal communications to vest plan benefits. *Moore*, 856 F.2d at 492-93; *DeGrooth*, 837 F. Supp. at 488.

Moore and the policy against automatic vesting of welfare plans dispose of petitioners' argument that a contract to vest arose from employee contributions to their life and health insurance. *Moore* rejected the argument that a contract to vest was formed by the retirees who had worked for Metropolitan, and who presumably had made the required contributions. 856 F.2d at 491-92. Following *Moore*, the Eleventh Circuit expressly rejected the argument that health insurance benefits vested where employees made a contribution for their benefits. *Alday v. Container Corp. of Am.*, 906 F.2d 660, 663-64 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). Petitioners' argument would flout congressional intent by automatically vesting the many thousands of welfare benefit plans across the country that require employee contributions (usually because of the rising costs of medical care). *See, e.g.*, 26 U.S.C. § 125 (allowing employees to pay for part of their welfare benefits using pre-tax dollars); *Jorgenson, Flexible Compensation and Cafeteria Plans*, L838 ALI-ABA 1033 (1993) (trend toward employee contributions to welfare plans recognized).

Finally, petitioners' statement that in this case "pronouncements of changes issued by senior corporate management [were] declared [under *Moore*] to be a nullity because they were not incorporated in an SPD issued many years before" (Ptn. 9) mischaracterizes the decision of the Second Circuit. The Second Circuit merely held in this case, consistent with the policy of ERISA and the decision in *Moore*, that an unambiguous reservation of rights provision in the SPD permits a company to change or alter welfare benefits.*

II. THIS CASE AND *MOORE* ARE CONSISTENT WITH AND DO NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.

A. This case and *Moore* are consistent with the decisions of other Circuit Courts of Appeal and have been followed by several district courts. Following the lead of *Moore*, the Circuit Courts of Appeal have uniformly held that welfare benefits do not vest automatically, but may be amended or terminated as long as the plan sponsor has reserved the right to do so. *See Allen v. Adage, Inc.*, 967 F.2d 695, 698 (1st Cir. 1992); *United Paperworkers Int'l Union v. Jefferson Smurfit Corp.*, 961 F.2d 1384, 1385-86 (8th Cir. 1992); *McGann v. H & H Music Co.*, 496 F.2d 401, 407 (5th Cir. 1991); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1164 (3d Cir. 1990); *Alday v. Container Corp. of Am.*, 906 F.2d at 665-66; *Howe v. Variety Corp.*, 896 F.2d 1107, 1110 (8th Cir. 1990); *Ryan v. Chromalloy Am. Corp.*, 877 F.2d 598, 604 (7th Cir. 1989).

Numerous district courts have relied upon *Moore* to reject employee or retiree claims that informal communi-

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* Petitioners also assert for the first time that reliance upon the SPD pursuant to *Moore*, instead of informal communications, denies petitioners' "due process in this case." (Ptn. 8.) To the extent petitioners are now making a due process argument, they are barred from doing so because they failed to make that argument below. *Heckler v. Campbell*, 461 U.S. 458, 469-69 n.12 (1983).

cations vest welfare benefits despite an express and unambiguous reservation of rights provision in the SPD. *See, e.g., Aguilio v. Police Benevolent Ass'n of the New York State Troopers, Inc.*, 857 F. Supp. 190, 204-05 (N.D.N.Y. 1994); *Snyder v. Elliot W. Dann Co.*, 854 F. Supp. 264, 271 (S.D.N.Y. 1994); *Rovira v. AT & T*, 817 F. Supp. 1062, 1071 (S.D.N.Y. 1993); *Etherington v. Bankers Life & Cas. Co.*, 747 F. Supp. 1269, 1276-79 (N.D. Ill. 1990).

B. Petitioners assert that the decision in *Moore* conflicts with the decisions of other Circuit Courts of Appeal. (Ptn. 8.) Petitioners assert that "[e]merging case law in ERISA situations is diverging from the *Moore* standard." *Id.* (citing *Mullins v. Pfizer, Inc.*, 23 F.2d 663, 668-69 (2nd Cir. 1994); *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3rd Cir. 1993); *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988)).

Mullins, Fischer and *Berlin,* however, do not conflict with *Moore* because these cases involved conduct tantamount to fraud and addressed an issue distinct from the one in *Moore.* In these cases, the respective courts held that a plan sponsor, acting in its fiduciary capacity, may not materially mislead plan participants about changes to an employee benefits plan. *Mullins,* 23 F.3d at 664, 667-69; *Fischer,* 994 F.2d at 134-35; *Berlin,* 858 F.2d at 1163-64. In each case, the plan sponsor tricked or otherwise encouraged one or more employees into taking early retirement by stating that the plan sponsor was not considering the implementation of an early retirement program with enhanced benefits. *Mullins,* 23 F.3d at 665, 669; *Fischer,* 994 F.2d at 132, 134-35; *Berlin,* 858 F.2d at 1160, 1163-64. In reliance upon these statements, one or more plan participants opted for early retirement, and shortly thereafter, the plan sponsor implemented an early retirement program with enhanced benefits. *Mullins,* 23 F.3d at 665, 669; *Fischer,* 994 F.2d at 132, 134-35; *Berlin,* 858 F.2d at 1160, 1163-64.

Mullins, Fischer and *Berlin* thus differ from *Moore*. In each case, the plan participants alleged conduct tantamount to fraud. In *Moore* and in this case, however, there was an express finding that plan participants did not allege conduct tantamount to fraud. *Moore*, 856 F.2d at 493; *DeGrooth*, 837 F. Supp. at 488. Moreover, *Moore* and this case did not involve any allegations that plan participants retired because of misrepresentations about the future enhancement of early retirement benefits. *Moore* and this case therefore do not conflict with *Mullins, Fischer* and *Berlin*.

C. *Moore* also does not conflict with *Schoonejongen v. Curtiss-Wright Corporation*, 18 F.3d 1034 (3d Cir.), *cert. granted*, 115 S. Ct. 42 (1994). In *Curtiss-Wright*, the Third Circuit Court of Appeals construed Section 402(b)(3) of ERISA, 29 U.S.C. § 1102(b)(3), which provides in pertinent part: "Every employee benefit plan shall provide a reasonable procedure for amending such plan, and for identifying the persons who have authority to amend the plan." The Court invalidated a plan sponsor's amendment terminating all benefits, because the plan did not specify a procedure for amendment or identify the persons who have authority to amend the plan in violation of Section 402(b)(3). 18 F.3d at 1040. The Court reasoned that although the plan sponsor had the power to terminate the plan because it had reserved the right to amend or terminate the SPD, the sponsor had not exercised that power properly under Section 402(b)(3). *Id.*

This case and *Moore* are not implicated in any way by *Curtiss-Wright*. *Curtiss-Wright* addressed and decided an issue relating to the interpretation of and compliance with Section 402(b)(3). This case and *Moore* do not involve Section 402(b)(3). Therefore, the grant of certiorari in *Curtiss-Wright* does not implicate this case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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